UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT CLARKSBURG

TURNER CONSTRUCTION COMPANY,	:	
Plaintiff/Counterclaim Defendant,	:	
v.	:	**CASE NO. 1:16-cv-58 (IMK)**
WYATT INCORPORATED,	:	
Defendant/Counterclaim Plaintiff.	:	

DEFENDANT/COUNTERCLAIM PLAINTIFF WYATT INCORPORATED'S OPPOSITION TO TURNER CONSTRUCTION COMPANY'S MOTION FOR LEAVE TO FILE EARLY MOTION FOR SUMMARY JUDGMENT AND ENTRY OF BRIEFING SCHEDULE

Defendant/Counterclaim Plaintiff, Wyatt Incorporated ("Wyatt"), by and through its undersigned counsel, hereby opposes Plaintiff/Counterclaim Defendant Turner Construction Company's Motion for Leave to File Early Motion for Summary Judgment and Entry of Briefing Schedule for the reasons set forth in the accompanying Memorandum of Law.

Respectfully Submitted,

COHEN SEGLIAS PALLAS
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Dated: November 8, 2016

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WYATT INCORPORATED,	:	
Defendant/Counterclaim Plaintiff.	:	

DEFENDANT/COUNTERCLAIM PLAINTIFF WYATT INCORPORATED'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF/COUNTERCLAIM DEFENDANT TURNER CONSTRUCTION COMPANY'S MOTION FOR LEAVE TO FILE EARLY MOTION FOR SUMMARY JUDGMENT AND ENTRY OF BRIEFING SCHEDULE

Defendant/Counterclaim Plaintiff Wyatt Incorporated ("Wyatt"), by and through its undersigned counsel, submits this Memorandum of Law in Opposition to the Motion for Leave to File Early Motion for Summary Judgment and Entry of Briefing Schedule (the "Motion") filed by Plaintiff/Counterclaim Defendant Turner Construction Company ("Turner"). For the reasons set forth more fully below, Turner's Motion should be denied.

I. BACKGROUND

This matter arises out of a dispute regarding construction services rendered by Wyatt pursuant to a subcontract with Turner in connection with the construction of the Biometric Technology Center, New Office Building and Central Utilities Plant Expansion located on the premises at the FBI CJIS Division Complex in Clarksburg, West Virginia ("Project"). Upon information and belief, Turner entered into a contract with the United States of America, acting by and through the Federal Bureau of Investigation, United States Department of Justice (the "Owner") to furnish materials and perform labor on the Project.

Turner filed a Complaint against Wyatt on April 6, 2016. Wyatt answered the Complaint and filed a Counterclaim (which is the subject of Turner's proposed motion for summary judgment) on August 10, 2016. Turner answered Wyatt's Counterclaim on September 2, 2016. On September 23, 2016, Turner filed a Motion for Summary Judgment, seeking dismissal of all of Wyatt's claims asserted in its Counterclaim that arose on or before October 31, 2014. (Dkt. No. 42) Because Wyatt had not had the opportunity to discover information essential to its opposition to Turner's Motion for Summary Judgment, Wyatt filed a Motion Pursuant to Federal Rule of Civil Procedure 56(d) on October 4, 2016. (Dkt. No. 45) On October 7, 2016, this Court entered an Order (dkt. no. 47) denying Turner's Motion for Summary Judgment due to Turner's failure to request an early briefing schedule pursuant to the Court's Scheduling Order (dkt. no. 36). Turner now seeks leave to file an early motion for summary judgment and for this Court to enter an early briefing schedule. For the reasons outlined herein, this Court should deny Turner's Motion and allow the parties to fully engage in discovery.

II. ARGUMENT

A. Turner failed to raise its intention to file an early motion for summary judgment during the Parties' Initial Planning Meeting or the Scheduling Conference with the Court.

Throughout its dealings with both Wyatt's counsel and this Court, Turner and its counsel failed to indicate their intention to file an early motion for summary judgment prior to the completion of discovery in this action. Prior to its initiation of this action, Turner was well aware of the existence of Wyatt's claim and the fact that Wyatt allegedly executed the waiver forms upon which Turner intends to rely to support its summary judgment motion. Wyatt submitted a Request for Equitable Adjustment to Turner in or around January 2015, which outlined the impacts to its work and the damages it incurred. The parties negotiated and attempted to resolve Wyatt's claim and ultimately engaged in mediation, albeit unsuccessful, on March 31, 2016. Moreover, after Turner's initiation of this action on April 6, 2016 and prior to the entry of the Scheduling Order on August 11, 2016 (dkt. no. 36), Turner had further notice of Wyatt's claim and damages. For example, on April 14, 2016, Wyatt initiated a separate action against Turner, which specifically set forth its claim and damages. Moreover, Wyatt provided its Initial Disclosures to Turner on July 5, 2016. In those Disclosures, Wyatt indicated that it had incurred more than $5.3 million in damages on the Project and would be pursuing those damages in a counterclaim.[1] All of this notice of Wyatt's claim is in addition to the ongoing notice that Wyatt provided to Turner of the delays and impacts to its work throughout the duration of the Project.

Despite this advance notice of Wyatt's claim and knowledge of Wyatt's purported execution of the waiver forms more than two (2) years ago, Turner's counsel never mentioned or requested that dates be allocated for the filing of an early motion for summary judgment. At or around the end of May or early June 2016, the parties' respective counsel participated in a Rule 26(f) conference to discuss and agree upon a proposed discovery plan. Not once during those conversations did Turner's counsel raise the need to schedule a date for its filing of an early motion for summary judgment based upon the waiver forms that Wyatt purportedly executed during the Project. The parties submitted a Joint Report of the Parties' Planning Meeting to the Court on June 10, 2016. (Dkt. No. 24) No where in that Report is it mentioned that Turner intended to file an early motion for summary judgment. The parties' respective counsel attended

[1] Wyatt filed its Counterclaim on August 10, 2016. (Dkt. No. 34)

a scheduling conference with this Court on August 8, 2016, during which the parties and the Court discussed, at length, the dates and deadlines through the trial of this action. When discussing the deadlines for the filing of dispositive motions, Turner's counsel never indicated that it intended to file an early motion for summary judgment.

It is clear that Turner's Motion is in response to this Court's denial of Turner's previously filed motion for summary judgment. Because Turner failed to first request an early briefing schedule when it originally filed its motion for summary judgment, it should not be given a second bite at the apple. Turner's counsel had ample notice of Wyatt's claims and its supposed execution of the waiver forms and had every opportunity to request a schedule for the filing of an early motion for summary judgment. Turner failed to do so at the appropriate time, and its Motion should be denied.

B. Discovery is essential to Wyatt's opposition to Turner's proposed motion for summary judgment.

Despite the infancy of this action and the fact that discovery does not close until May 19, 2017, Turner seeks leave to file a motion for summary judgment based upon certain waiver forms that were executed by Wyatt in order to receive periodic payments from Turner for its work on the Project. Turner mistakenly takes the position in its Motion that no discovery is necessary for the "discreet *[sic]* issues" that will be raised in its proposed summary judgment motion. These issues are anything but discrete and require extensive discovery regarding the facts and circumstances surrounding Wyatt's execution of the waiver forms. As previously stated in Wyatt's Motion Pursuant to Federal Rule of Civil Procedure 56(d) (dkt. no. 45), Wyatt needs and is entitled to discover facts regarding the following:

1. Turner's unilateral change to the waiver form twenty-seven (27) months into the Project, including whether any consideration was provided to Wyatt to execute the new waiver form;

2. The parties' course of conduct in processing and paying change orders and submitting claims at or around the times that Wyatt executed the waiver forms;

3. The ongoing notice that Wyatt provided to Turner regarding the delays and impacts to its work and that it had claims for additional monies; and

4. Turner's advancement of claims to the Owner, both on its own behalf and on behalf of Wyatt.

Information surrounding these subjects is essential to Wyatt's defenses surrounding the enforceability of the waiver forms, which are at the heart of Turner's proposed motion for summary judgment and create issues of material fact sufficient to defeat Turner's proposed summary judgment motion. No documents have been exchanged between the parties and no depositions have been noticed or conducted. As the Fourth Circuit has recognized, "summary judgment must be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 246-47 (4th Cir. 2002).

The basis for Wyatt's Rule 56(d) Motion has not changed. Wyatt, as the nonmovant, should not be forced "into a fencing match without a sword or a mask" and, instead, must be afforded the opportunity to discover information essential to its opposition. *McCray v. Md. Dept. of Transp., Md. Transit Admin.*, 741 F.3d 480, 483 (4th Cir. 2014) (emphasis added). Allowing Turner to file its proposed summary judgment motion will not conserve resources, as Wyatt will again file a motion pursuant to Rule 56(d) in response. Discovery in this matter is necessary before Wyatt can respond to Turner's proposed motion for summary judgment, and Turner's Motion should be denied.

III. CONCLUSION

For the foregoing reasons, Wyatt respectfully requests that this Court deny Turner's Motion.

Respectfully Submitted,

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